87-691

Supreme Court, U.S.
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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

LAWRENCE J. GALARDI,
Petitioner,

VS.

BERNIE LERNER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Refusal of the Bankruptcy Appellate Panel to Hear This Appeal on the Merits a Departure from the Accepted and Usual Course of Judicial Proceedings, Sufficient to Warrant an Exercise of this Court's Power of Supervision?

2. Do the Conflicting Decisions on Pivotal Issues Reached in Three Other Bankruptcy Court Proceedings Warrant the Granting of a Writ of Certiorari?

3. Does the Award of Punitive Damages without Hearing Constitute a Violation of Due Process?

4. Was the Award of $93,652.83 in Attorney's Fees, Without Hearing and Without Evidence, both a violation of due process and an Abuse of Judicial Discretion, Sanctioned by the Bankruptcy Appellate Panel and the Ninth Circuit and Therefore Constituting a Departure from Accepted Judicial Proceeding Sufficient to Warrant an Exercise of this Court's Power of Supervision?

5. Was the Trial Court Without Subject Matter Jurisdiction?

PARTIES

Petitioner submits the following list of all persons or entites which have an interest in the outcome of the case before this Court.

Lawrence J. Galardi — Petitioner
Bernie Lerner — Respondent
David A. Gill — Trustee
Lawrence J. Galardi, A Professional Corporation
— a defendant below
Shari J. Galardi — a defendant below

DATED: September 21, 1987

By LAWRENCE J. GALARDI
Attorney for Petitioner

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STATEMENT

A. Preliminary

This matter was tried in the United States Bankruptcy Court for the Central District of California. The Honorable Russell Seymour presided.[1]

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[1]The case was tried before Judge Seymour on January 24, 25, 26 and 31, 1984. The Reporter's Transcript and Exhibits were not transmitted by the Clerk of the Court to either the Panel or the Ninth Circuit, according to the respective dockets of those courts, although appropriate requests were made to the Clerk of the Bankruptcy Court and the Clerk of the Panel, to do so.

Thereafter, Judge Seymour declined to decide the case. Judge Russell decided the case, entering Findings of Fact and Conclusions of Law and Judgment thereon on June 24, 1985. (Appendix C.) A timely appeal to the Bankruptcy Appellate Panel, (hereinafter, the "Panel"), was taken. (Appendix C.)

The Bankruptcy Appellate Panel failed to process the appeal. Memoranda in its files reveals the case was "lost in the crack" (its characterization), along with approximately twenty others.

An Order Dismissing the Appeal was entered, without notice, on April 23, 1986, on the grounds that the Designation of Record and Statement of Issues were not filed. Those documents had, in fact, been filed as aforesaid and they were lost by the Clerk of the Court.[2] Appellant's Opening Brief to the Panel had also been filed and served on March 19, 1986. (Appendix G; Appendix K.) File stamped copies were placed before the Panel and the Circuit.

A Motion for An Order Vacating the Order Dismissing the Appeal (Appendix H) was denied by the Bankruptcy Panel by Order dated January 2, 1987. (Appendix B.)

In denying the motion, the Panel stated:

> "whatever merits might exist with respect to the Motion to Vacate are overwhelmed by the dilatory conduct of the Appellant."

Petitioner sought extraordinary relief to reinstate the appeal by way of a Writ of Mandate to the United States

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[2]Appendix K sets forth file stamped copies. Appendix G, the Bankruptcy Appellate Panel docket, reveals no entries were made by the Panel Clerk. It also sets forth the staff attorney memo stating this case and approximately twenty others were "lost in the crack."

Court of Appeals for the Ninth Circuit. The petition for writ demonstrated: (1) there was no basis for charging Petitioner with the failure of the Panel to process the Appeal[3]; (2) there was clear reversible error in the trial court; (3) there are significant irregularities in the Clerk's processing of the appeal; and, (4) Petitioner will suffer irreparable harm and there are no other means to protect Petitioner from the harm visited by the decision below.

The Ninth Circuit denied the Petition for Writ of Mandate, per curiam, on June 24, 1987. (Appendix A.)

B. The Judgment Appealed From

The findings, conclusions and judgment appealed from, entered by Judge Russell, appear in Appendix C. Although the case was tried by Judge Seymour, he thereafter declined to decide the case, without explanation. The case was set for re-trial in November of 1984. At that time, all parties announced ready. Judge Russell, however, asked counsel for the parties to instead stipulate to decision on the Trial Transcript, exhibits, pleadings and briefs with the understanding that further testimony and evidence would be permitted as appropriate. Counsel for Petitioner so stipulated.

A hearing was scheduled for March 20, 1985. At that time, however, and without further hearing Judge Russell announced his decision. No additional evidence was taken, no witnesses were called to appear before Judge Russell, at any time. That was *not* the earlier agreement.

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[3]Appendix G. Both the Statement of Issues and Designation of Record were filed during the period the Panel and the Court Clerk's offices were in the process of being moved to their present location in Pasadena.

The issues that had been raised made it clear to all parties that to resolve the conflicting evidence it was necessary for the Court to independently observe the Lerner Brothers and Petitioner, Lawrence J. Galardi, and other significant witnesses in order to independently assess their credibility. Only determining who was telling the truth could resolve the numerous material conflicts in the evidence. Judge Russell failed to do that.

No evidence was taken as to the reasonablility of attorneys' fees or services performed by attorney Lerner or attorney Castenares.[4] There was no trial of punitive damages and they were not an issue in the pretrial order which governed the trial.

Presumably, the statement by the Panel "— whatever merits might exist with respect to the motion to vacate . . ." refers at least in part to the failure of Judge Russell to resolve conflicting testimony and independently determine who and what could be believed as between the Lerner Brothers and Mr. Galardi and the independent witnesses. It is also reasonable to conclude that the panel recognized this as a non-dischargeability case, that there had been an extraordinary award of over $93,000 in attorneys' fees, and that the Panel had "lost" the appeal materials and failed to process this case along with twenty other cases.

C. Factual Summary

Respondent Lerner and Lawrence J. Galardi, a Professional Corporation, entered into an agreement dated De-

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[4]The trial before Seymour was four court days. There were three appearances before Russell and there was no discovery (depositions, interrogatories, etc.) before trial. *$93,652.83 was awarded in fees by Russell.*

cember 1, 1978. The agreement was prepared by attorney Richard S. Lerner, who represented his brother, Bernie Lerner, at all times before and since, and was a party to the agreement but not a party to the litigation.[5]

Bernie Lerner funded $91,000.00 to the Corporation on December 1, 1978. The agreement presented by attorney Lerner for execution on December 1, 1978, required receipt for $101,000.00. (The remaining $10,000.00 loaned was paid over the next several months.)

A finder's fee of $10,000.00 was paid by the Corporation to Attorney Lerner,[6] in connection with the loan.

Attorney Lerner unilaterally embarked upon a course of conduct that incorporated as a major premise, claims that this brother, Bernie Lerner, and his client, John Taylor (a contractor), alternately were or were not partners of both Petitioner individually and of the Corporation, depending on the private purposes he sought to achieve at varying times.[7]

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[5]Judge Russell also entered judgment in what he characterized as a consolidated proceeding, namely, *Lawrence J. Galardi, et al., v. Bernie Lerner*, LA 81-0656 RS. That consolidated case was not tried, however, and no evidence was permitted in the trial court by Judge Seymour. Those Article III issues were eliminated before trial evidence was taken.

[6]It was testified that the following exchange occurred in an earlier proceeding:

Bernie Lerner: "You never told me that you got $10,000 for this deal."

Richard Lerner: "Shut up, stupid."

[7]Other such claims were the subject of another non-dischargeability adversary proceeding, *Taylor v. Galardi*, No. 81-0653 (Seymour), in which Petitioner prevailed. See, Appendix D.

The Bankruptcy Court had earlier dealt with attorney Lerner's *spurious claims of partnership* between Lerner and Galardi, and Taylor and Galardi, on several occasions with the result that findings of *no partnership* had been conclusively made and entered.

Judge Russell's findings and conclusions were made and entered *subsequent* to all of the prior Bankruptcy Court proceedings and constituted the only departure from the clear and unequivocal record that no partnerships have ever existed and the clear and unequivocal proof that there was never an attorney-client relationship with Bernie Lerner. Those facts are pivotal to this petition for Certiorari as Judge Russell's decision is premised upon his finding that this was a partnership giving rise to fiduciary duties and not merely a loan transaction as intended by the parties.

The Bankruptcy Court dismissed an involuntary Petition for Bankruptcy filed by unsecured creditors of Petitioner wherein they asserted claims against the alleged partnership of Lerner/Galardi. The Bankruptcy Court found there was no such partnership or joint venture. Judge Russell ingored that.

During the course of that proceeding, Bernie Lerner, swore under oath "I agreed to *lend* Lawrence J. Galardi the sum of $101,000.00 . . . . I have never at any time held myself out as Lawrence J. Galardi's partner." Judge Russell ignored that, too.

The Bankruptcy Court similarly found earlier that there was no partnership as claimed by attorney Lerner between his client Taylor and Petitioner. The Bankruptcy Court earlier discharged Petitioner with respect to all claims made on behalf of Taylor against Petitioner. (Appendix D.)

REASONS FOR GRANTING CERTIORARI

Petitioner respectfully submits that certiorari should be granted because:

A. The refusal of the Bankruptcy Panel to vacate its Order Dismissing the Appeal and the failure of the Ninth Circuit to require the appeal be reinstated or, in the alternative, to hear the appeal, de novo, on the merits, constitutes a departure from the accepted and usual course of judicial proceedings and warrants an exercise of this Court's power of supervision;

B. The award of punitive damages without hearing, and consequently without notice to Petitioner and without calling Petitioner personally before the Court, to resolve conflicting evidence and credibility, at any time, constitutes a violation of due process;

C. The conflicting decisions on pivotal issues (was there a partnership) reached in three other Bankruptcy Court proceedings warrant the granting of certiorari so as to permit hearing the appeal on its merits;

D. Russell's award of $93,652.83 in attorneys' fees, without evidence as to whether they were reasonably incurred, constitutes an abuse of judicial discretion that was sanctioned by the Bankruptcy Panel and the Ninth Circuit, thereby constituting a departure from accepted judicial proceeding sufficient to warrant an exercise of this Court's power of supervision, even apart from the violation of due process occasioned thereby, in the Court below;

E. The decision below and the intervening failure of the Panel and the Circuit to reverse and discharge the attorneys' fees awarded below has decided a federal question, namely, whether attorneys' fees are recoverable in a non-dischargeability case, in a way which is in conflict

with applicable decisions of Circuit Courts and of this Court;

F. The Court below was without subject matter jurisdiction because neither the Federal Rules of Civil Procedure, the Transition Statute, nor the Emergency Rule empowered the District Court to seat a retired annuitant as a bankruptcy judge.

Accordingly, Petitioner respectfully submits the Judgment below and the orders of the Panel and the Ninth Circuit should be reversed. The Appeal should be heard and decided on the merits. The failure to accord due process and afford judicial review, in these circumstances, Petitioner respectfully submits, warrants the grant of certiorari.

ARGUMENT

Point I

CERTIORARI IS WARRANTED WHERE THE COURT BELOW AND THE INTERVENING APPELLATE COURTS' DISPOSITION CONSTITUTES A SIGNIFICANT DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING WHICH RESULTS IN A DENIAL OF DUE PROCESS.

Rule 17 of the Revised Rules of the Supreme Court of the United States (as amended through June 5, 1987) articulates certain advisory parameters of judicial discretion governing review on certiorari, which while neither controlling nor undertaking to fully measure this honorable court's discretion, sets forth reasons for review that are applicable here. It is suggested that certiorari be granted,

> "(1)(a) When a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. . . .
>
> "(c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court."

Rule 17, S.Ct. Rules

Petitioner sought a writ of mandamus vacating the order dismissing appeal entered by the Panel and for other extraordinary relief in the Ninth Circuit pursuant to 28 U.S.C. 1651 et seq. The Court of Appeals declined to exercise its supervisory power over the Panel. The Panel dismissed Petititoner's appeal for reasons of delay in processing the appeal when in fact the appeal was "lost" in the office of the Clerk. No delays were caused or engendered by Petitioner, (Appendix H.), either below or on appeal.

Petitioner sought an order vacating the dismissal once Petitioner learned of the Dismissal. In truth and in fact, the appeal was not processed by the Panel Clerk's office because of confusion that existed at that time in the Clerk's office engendered by both new filings, pending business and the problems associated with moving to new quarters and the employment of new personnel. A discussion of F.R.C.P. 60, 60(a), and 60(b) was provided the Panel and brought to the attention of the Ninth Circuit urging the appeal which had been "lost in the crack" along with approximately twenty other cases, (according to memos in the Panel file) be reinstated.

In that context, there can be no reasonable justification for dismissing the appeal. This Court is asked to correct that abuse of judicial discretion in the exercise of its supervisory powers.

In determining whether to exercise its discretion and issue a writ of mandate pursuant to 28 U.S.C. Section 1651 et seq., the Ninth Circuit had six fundamental factors weighing in favor of issuance of the writ. Petitioner had no other adequate means, such as direct appeal, to attain the relief sought. Petitioner will obviously be irreparably damaged in a way that is not otherwise correctable on appeal, in these circumstances. The judgment appealed from rendered in the Bankruptcy Court is clearly erroneous as a matter of law and the rationale relied upon by the Panel, which recognized merit in the appeal but declined to permit it to go forward on the merits, was premised on an erroneous perception of the facts.

The decision of the Bankruptcy Court manifests persistent disregard of federal rules and disregard in these circumstances of due process. The judgment of the Bankruptcy Court raises new and important problems of first impression, vis a vis, the functioning of the Bankruptcy Court system prior to the 1984 act. *Wheeler v. United States* (1981, CA 9 Wash) 640 F.2d 1116. The Panel declined to resolve the appeal on the merits and the Ninth Circuit's refusal to grant the writ sought constituted an abuse of that Court's discretion. *Castanho v. Jackson Marine* (1981, CA 5 Tex) 650 F.2d 546. It is clear and indisputable that petitioner's right to appeal has been foreclosed by the denial of the writ and it is that fundamental denial of due process, together with the demonstrated need to supervise the conduct of the Court's business both below, at the level of the Panel and in the

Ninth Circuit, that requires granting of certiorari. *United States v. Mehrmanesh* (1980, CA 9 Ariz.) 652 F.2d 766; *In re Bendectin Products Liability Litigation,* (1984, CA 6 Ohio) 749 F.2d 300; *Wheeler v. United States, supra.*

Point II

THERE WAS NO FIDUCIARY RELATIONSHIP HERE WITHIN THE MEANING OF 11 U.S.C. 523(A)(4).

The award of a judgment of non-dischargeability together with punitive damages, premised as it was upon Petitioner being an attorney together with Judge Russell's erroneous perception of the agreement and the conduct of the parties was clearly erroneous. There was no fiduciary relationship artificially created by the agreement warranting a judgment of non-dischargeability on any grounds. *Davis v. Aetna Acceptance Co.* (1934) 293 U.S. 328, 55 S.Ct. 151; *In re Thornton* (9th Cir. 1976) 544 F.2d 1005; *In re Pedrazzini,* (9th Cir. 1981) 644 F.2d 756.

There was no attorney/client relationship. There was no partnership/joint venture fiduciary relationship. There was no limited partnership. And, no trust relationship was artificially created. Accordingly, no more than the loan transaction intended by the parties existed. *Davis v. Aetna, supra.* Both *Thornton* and *Pedrazzini* recognized constructive or resulting trusts do not preclude dischargeability and, since there was no trust and no fiduciary relationship *before the acts complained of,* discharge is not impaired according to the rule in *Davis v. Aetna, supra.* Arguably, the Panel recognized this when it alluded to "whatever merits might exist with respect to the motion to vacate . . .", but, whether perceived or not below, it warrants review on the issues of dischargeability, punitive damages and attorneys' fees. Petitioner submits

only relief by review on certiorari will provide accord with this Court's time-worn, yet ageless, decision in *Davis v. Aetna.*

Point III

IT WAS ERROR AS A MATTER OF LAW FOR JUDGE RUSSELL TO AWARD PUNITIVE DAMAGES WITHOUT FIRST RESOLVING CONFLICTING TESTIMONY AND ISSUES OF CREDIBILITY; AND IN VIEW OF THE EARLIER DETERMINATIONS THAT THERE WAS NO PARTNERSHIP AND NO ATTORNEY-CLIENT RELATIONSHIP.

Review of Judge Russell's action and the summary disposition of the appeal will protect Petitioner who is threatened with irreparable harm and has no other means of protection. *Teleport Oil Co. v. Security Pacific National Bank (In re Teleport Oil Co.)* [9th Cir. 1985] 759 F.2d 1376, at page 1378. See, also *Hialeah Hospital, Inc. v. Department of Health and Rehabilitative Services (In re King Memorial Hospital, Inc.)* [11th Cir. 1985] 767 F.2d 1508, at page 1510; and *Cohen v. Beneficial Industries Loan Corp.* (1949) 337 U.S. 541 for support of the rule that review is mandated where the issues that are raised are too important to be denied review as they present a serious question of law.

Here awarding punitive damages on this record without independently assessing credibility and making a determinative finding as to credibility on conflicting issues first, is patently unjust. It constitutes a denial of due process as does the informal substitution of a judge to decide the case when another judge heard the evidence and observed the witnesses. Judge Russell stated his award of punitive damages was based upon the fact that *the property owner and developer*, Petitioner Lawrence J.

Galardi *is an attorney.* That is error as a matter of law. Judge Russell did not, *at any time* have Petitioner before him, personally. Punitive damages were not an issue framed by the Pre-Trial Order drafted by Respondent's attorneys. It was not an issue mentioned in Respondent's Trial Brief. It was raised post-trial, was not litigated and Judge Russell did not permit it to be defended against by virtue of his summary disposition. Accordingly, it was error to refuse to hear and decide the appeal on its merits. *Wheeler v. United States, supra.*

The earlier dismissal by Judge Seymour of the involuntary petitions filed by unsecured creditors against the alleged partnerships is entitled to both res judicata effect and recognition as the law of the case on those pivotal issues. (LA 82-20725; LA 82-20724).

Petitioner submits res judicata is not a mere matter of practice or procedure inherited from a more technical time. A matter once litigated cannot be brought again into litigation between the parties to the controversy upon any ground whatsoever. *Dowell v. Appelgate* (1894) 152 U.S. 237, 38 L.Ed. 463, 14 S.Ct. 611, ennunciates that timeless principle. The rule is one of fundamental and substantial justice and it must be adhered to in the Bankruptcy Court. It is a rule of both public policy and private peace and it is a rule which should be enforced by this Court to the end that rights once established in a court of competent jurisdiction must be recognized by those who are bound by that judgment in every respect. *Hart Steel Co. v. Railroad Supply Co.* (1917) 244 U.S. 294, 61 L.Ed. 1148, 37 S.Ct. 506.

Furthermore, re-litigation of the same issues vis-a-vis the Lerner/Galardi transaction in a different cause of action or in a different forum is also precluded by rules of Collateral Estoppel. The doctrine is one of preclusive

effect and therefore carries severe jurisdictional penalties. *Lawler v. National Screen Service Corp.* (1955) 349 U.S. 322, 99 L.Ed. 1122, 75 S.Ct. 65. The rule prevails where the parties have had a full and fair opportunity to present the basic issues that are essential to judgment. *Allen v. McCurry* (1980) 449 U.S. 90, 6 L.Ed.2d 308, 101 S.Ct. 411; *Partmar Corp. v. Paramount Pictures Theatres Corp., supra; Cromwell v. County of Sacramento* (1877) 94 U.S. 351, 24 L.Ed. 195. *Lerner's declaration under oath put to rest the claims of partnership and fiduciary duty and precluded any fundamental determination other than the transaction was a loan* with a profit participation contrived by Lerner for the benefit of Lerner. See also, Vestal, "The Constitution and Preclusion/Res Judicata", 62 Michigan Law Review 33 (1963); *Hoag v. New Jersey,* (1958) 356 U.S. 464, 2 L.Ed.2d 913, reh. den. 357 U.S. 933, 2 L.Ed. 1375; *Williamson v. Columbia Gas & Electric Corp.* (C.A.3d 1950) 186 F.2d 464, cert. den., 341 U.S. 921.

The earlier ruling as to no Lerner/Galardi partnership is also "the law of the case" in the underlying bankruptcy proceedings, LA 81-00606 RS. It should have been adhered to consistently. *DeTenorio re Lightsey* (C.A. 5th 1979) 589 F.2d 911, 917, cert. den., 444 U.S. 831; *Zdanok v. Glidden Co.* (C.A.2d 1964) 327 F.2d 944, 952, cert. den., 377 U.S. 934. See also, *Morrow v. Dillard* (C.A. 5th 1978), 580 F.2d 1284, 1291; *United States v. U.S. Smelting Ref. & Mining Co.,* (1950) 339 U.S. 186, 198.

In any event, the res judicata effect removed discretion and compelled a consistent judgment here. *Heiser v. Woodruff, et al.* (1946) 327 U.S. 726; *Southern Ry v. Clift* (1922) 260 U.S. 316.

Finally, construction of the writings as of the time and in the circumstances the writings were made, requires the conclusion that no partnership of any kind was intended

by the parties or created thereby. That is true certainly as to the laws which subsist at the time and place of the making of the contract. *United States Trust Co. v. New Jersey* (1976) 431 U.S.1, 19-20, 52 L.Ed.2d, 108, 97 S.Ct. 1505; *C.I. Engineers & Constructors, Inc. v. Johnson & Turner Painting Co.* (1983) 140 Cal.App.3d 1011, 189 Cal.Rptr. 824. And, that must certainly be the rule of construction applied here in taking cognizance of the parties' intentions, their respective positions and their objectives, at the time they made their agreement. Judge Russell did not preceive that in his reading of the transcript. Here, hindsight assessment of claims made under questionable circumstances after their deal went sour, cannot reasonably be substituted for a full and fair evaluation of what the parties expected both in profits, participation and performance. Neither Lerner nor Taylor were "buying" partnership risks, exposure or liabilities. Clearly, there was no limited partnership established. They wanted *then*, only to be leaders. That was the Court's conclusion in *Taylor v. Galardi* and the result should not be different as to *Lerner*.

Point IV

IT WAS ERROR TO AWARD ATTORNEYS' FEES. AND, THERE IS NO EVIDENCE OF RECORD TO SUPPORT THAT AWARD.

Attorneys' fees are not recoverable in cases involving non-dischargeability. *Fulwiler v. Donald E. Grove* (1980) 624 F.2d 908, 910; *Alyeska Pipeline Service Co. v. Wilderness Society et al.* (1975) 421 U.S. 240; *Coast Trading Company, Inc. v. Collingwood Grain, Inc., et al.* (1984) 744 F.2d 686.

There was no evidence taken or offered that the attorneys' fees were reasonable or were reasonably necessary

to the preparation and trial of the non-dischargeability case, 81-5204, or anything else. Zealous counsel for Respondent asserted the total amount claimed to have been paid by Respondent to his brother attorney Lerner and to trial counsel. No records were produced, no evidence was taken and no authority was cited to justify the award that Judge Russell included in the judgment. (Appendix C. See, footnote 10, this brief.)

The trial took four days and there were three additional court appearances. There was no pre-trial discovery. Awarding $93,652.83 in attorneys' fees, assuming arguendo fees are recoverable, was an intolerable abuse of discretion by the Bankruptcy Judge. It should have been corrected or at least reviewed by the Bankruptcy Panel.

Point V

THE FINDINGS AND CONCLUSIONS ARE CLEARLY ERRONEOUS AS TO PETITIONER, LAWRENCE J. GALARDI, ESPECIALLY IN VIEW OF FINDINGS NUMBERED 4, 5 AND 7.

Findings 4, 5 and 7 (Appendix C, pages 16-17), clearly refer to the Corporation. It is uncontroverted that attorney Lerner insisted that *only the corporation,* (doing business for approximately five (5) years prior to the December, 1978 agreement), be a signatory and party to the agreement. There are no findings and conclusions, and there can be none, that support Judge Russell's having entered judgment against Petitioner, Lawrence J. Galardi. The preliminary language in finding No. 3 "referred to collectively as 'defendant' ", is not curative.

Other fundamental errors abound. Remarkable among them, Judge Russell failed to perceive or ignored the simple mathematics of the transaction. It was uncontro-

verted that ninety-one thousand dollars ($91,000.00) was funded by Lerner on December 1, 1978 and $10,000 additional was paid later. Petitioner paid $76,775.00 to escrow, an additional $5,233.00 was paid in escrow costs, $13,680.00 was paid in commissions, and $10,000.00 was paid to attorney Lerner as a "finder's fee." Thereafter, over $45,000 was paid in interest. The Court's assessment of compensatory damages was clearly erroneous.

Point VI

THERE ARE NO FINDINGS OR CONCLUSIONS WHICH SUPPORT ENTRY OF A JUDGMENT IN ADVERSARY PROCEEDING LA 81-0656 RS.

Judge Russell entered judgment in the adversary proceedings styled *Lawrence J. Galardi, Lawrence J. Galardi, a Professional Corporation, and Shari J. Galardi v. Bernie Lerner*, adversary number LA 81-0656 RS. That case involved Article III issues. It was "consolidated" by Judge Russell after the trial was concluded. *It was not tried before Judge Seymour.* He limited the trial to dischargeability only. No evidence was taken *or permitted by the trial judge* and Judge Russell took no evidence with regard to it. Petitioner was denied the opportunity to litigate the claims against the Lerners for wrongful attachment, interference with the loans and the refinance plan and the various breach of contract and interference with contract claims occasioned as a result of the Lerners' spurious partnership allegations and their conduct, which interfered with and prevented Petitioner's refinance of his three projects.

The erroneous entry of judgment denied access to an Article III Court and has deprived Petitioner of constitutional rights to due process that can be corrected only upon a direct appeal. That was denied Petitioner by both

the Panel and the Circuit in its denial of Mandamus. Accordingly, Petitioner submits, only review upon Certiorari will afford due process.

Point VII

THE COURT WAS WITHOUT SUBJECT MATTER JURISDICTION. NEITHER THE FEDERAL RULES OF CIVIL PROCEDURE, THE TRANSITION STATUTE, NOR THE EMERGENCY RULE EMPOWERED THE DISTRICT COURT TO SEAT A RETIRED ANNUITANT AS A BANKRUPTCY JUDGE.

A. Seating a Retired Annuitant Exceeded the Powers of the District Court. That is Significant here Because Judge Seymour, for Undisclosed Reasons, Failed to Decide the Case that he Tried.

In 1985, after the trial, it became apparent that Judge Seymour was not a sitting Bankruptcy Judge during the transition. Accordingly, there was no authority under the Emergency Rule at the time of the trial, for the appointment of Judge Seymour as a "Bankruptcy Judge". The Transition Statute, Section 404(a) of the Bankruptcy Reform Act of 1978 and the Bankruptcy Act of 1898, upon close examination, do reveal precedent for the appointment of Referees, Conciliation Commissioners or Special Masters. However, the Order of Judge Kelleher (Appendix I) "reappoints" Judge Seymour as a full-time Bankruptcy Judge. No measure of reasoning, however, provides constitutional authority for a District Judge to appoint a Bankruptcy Judge. Petitioner submits, at least one reasonable conclusion for Judge Seymour's failure to memorialize his tentative decision was someone's perception that he had no power (jurisdiction).

On November 13, 1981, Judge Seymour was "extended as a full-time Bankruptcy Judge" by Judge Hauk. (Appendix I) That appointment was not a constitutional exercise. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.* (1982) 458 U.S. 50, 102 S.Ct. 2858.

Thereafter, on June 10, 1982, Judge Seymour was again reappointed "a full-time Bankruptcy Judge" but only for the express purpose of presiding over *Beverly Hills Bancorp,* a case pending in the Central District. (Appendix I). Arguably, the Chief Judge may have thus accomplished the appointment of a Special Master.

On February 9, 1984, Chief Judge Real appointed Judge Seymour to serve as a "re-employed annuitant" on a per diem basis "as a part-time Bankruptcy Judge . . . for the express purpose of presiding over certain (otherwise unidentified) bankruptcy matters . . . ." (Appendix I). That appointment sounds like a special reference — it came after *Marathon* and it acknowledges the pendency of bankruptcy matters before the District Court.

If there is any doubt that Russell B. Seymour was anything more than a Referee or Special Master and only in those cases where constitutionally empowered by a specific legal Order of Special Reference or appointment, Petitioner respectfully refers this Court to the Order of Judge Curtis dated *April 16, 1984,* "Withdrawing Reference and Appointment of Special Master" pursuant to FRCP 53. It did not refer to or rely upon or acknowledge the "re-employment" of Judge Seymour as a retired annuitant as did the earlier Orders, it paid Judge Seymour a per diem as a Special Master (authorized Under Rule 53), and it cured, in all respects, the prior unconstitutional exercise of judicial power by Judge Seymour (Appendix I).

B. The Federal Rules Do Not Empower the District Court to Appoint Retired Annuitants as Bankruptcy Judges.

The Federal Rules are not constitutionally available to implement a system of bankruptcy courts and judges any more than the Congress can confer Article III powers through the Magistrates Act. *Pacemaker v. Instromedix, etc.*, 725 F.2d 537 (1984).

The Congress has said the Federal Rules, prescribed by the Supreme Court, shall not "abridge, enlarge or modify any substantive right." (28 U.S.C. Section 2072) The Supreme Court was empowered to prescribe rules for the practice and procedure to be followed under Title 11, the Bankruptcy Act of 1978. Those rules, too, "shall not abridge, enlarge or modify any substantive right." (28 U.S.C. Section 2075).

The Emergency Rule adopted by the Executive Committee of the Judicial Conference and implemented by Order of the United States District Court (entered December 27, 1982) (Appendix M) cannot serve to expand, limit or modify rights that have constitutional protection. Clearly, were it possible to cure the lack of subject matter jurisdiction by rule-making, there would have been absolutely no reason for the Supreme Court to stay its judgment in *Marathon*.[8]

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[8]The fact that Judge Russell noted on March 20, 1985, that *Marathon* had been decided, is not curative. Rather, it expresses recognition of the lack of subject matter jurisdiction in *this* case, on *these* facts, as to Judge Seymour. Judge Russell should have insisted on a new trial before an Article III court (since there were affirmative cross-claims). Failing to do so constituted a denial of due process. The Court compounded that denial when it entered judgment in adversary proceeding 81-0656, as those issues were not litigated. They were not included in the Pre-Trial Order and *were specifically*

While in a proper case it might be argued that the failure of the Congress to act created procedural uncertainty on the one hand and removed available substantive remedies on the other, that was not the basis upon which Judge Seymour severed the Article III issues, proceeded to try the case and then declined to decide it. The Respondent cannot therefore be heard in these circumstances, to reasonably argue the need to cure procedural uncertainties and continue the Bankruptcy Court system as a basis for somehow conferring subject matter jurisdiction on Judge Seymour.

The constitutionality of *Marathon* is not at issue here. the within appeal involves the constitutional need for an adequate and demonstrable effort at fair trial, a decision rendered on the merits and review. While this Court concluded in *Raddatz, infra,* that taking testimony was not required in all cases it, nevertheless, maintained the rule that "review" meant conducting a review in order to reach an independent determination of the issues that required Article III adjudication. *United States v. Raddatz,* 447 U.S. 667, 100 S.Ct. 2411 (1980). Here, the Bankruptcy Court Judge "went off the deep end" and the Panel, *albeit recognizing the merits of the appeal,* declined to act after its Clerk lost filings and the entire case was "lost in the crack" by the Clerk's office (Appendix G).

These issues must be decided on the merits.

Petitioner has no reason to delay a speedy and successful appeal. petitioner could not bond his appeal. Lerner has, and continues to execute, on the judgment appealed from. Against this background the sophomoric conclusion that Petitioner's "dilatory conduct" has "overwhelmed"

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excluded by the trial Judge, who limited the issues and evidence to dischargeability, only.

the merits of the appeal is both factually incorrect and unrealistic. The Petitioner has been required to deal with the club-like atmosphere of the Bankruptcy Court. It is fostered by counsel, Court attaches, the various Clerk's offices and, if the results complained of here are any measure, the Court below as well. Petitioner has been without representation for several years since over $6,500,000.00 of property and assets have been lost. Attaining the mythical "fresh start" is a fiction. It is impossible to reasonably conclude that the decision of the Panel was a reasoned and considered attempt to do justice. It is, however, reasonable to conclude it was simply adopted at the urging of a staff attorney (who authored the "lost in a crack" memorandum), defensive of their office system where the appeal file was "lost" and without the benefit of having reviewed the record. That is manifestly unjust.

In refusing to review the decision below on the merits, the Panel ignored why the trial judge did not decide the case and ignored the prejudice to Petitioner's constitutional rights. While the *dischargeability issues* arguably involved a "core proceeding", the case could not be tried by a Referee or Special Master cloaked with judicial powers and then given to a Bankruptcy Judge for decision under the guise of Judge Seymour "leaving the Bench." It was nothing more than an attempt at justification of the overzealous pursuit below. To permit that would at once bestow credibility on erroneous Findings and Conclusions of "the Bankruptcy Court" constituted as it was by a Retired Annuitant as Trial Judge and Judge Russell as decision-maker, and justify having denied access to the judicial power of the United States, in an Article III Judge, as necessary, or, a duly constituted Bankruptcy Trial Court, where appropriate. And, he did

not leave the Bench after January 31, 1984, the last day of trial, (Appendix I, see, Order dated February 9, 1984).

There was sound reason for either Judge Seymour, who was fully cognizant of his status, or Judge Russell, who was, or should have been, to decide that an Article III Court, should retry the case or at the least a duly constituted Bankruptcy Judge should expand the record as necessary and in accordance with the stipulation, before rendering a decision.

Pacemaker, supra, denied bankruptcy judges any such aggrandizement of their power and reaffirmed *Marathon.*

Carter, et al., v. Lumis, etc., 12 B.C.D. 536 (C.D. Calif. 1984) found the 1984 Act simply "codified" that Court's (Judge Takasugi's) perception of review and the District Court's functioning under the Emergency Rule. The 1984 Act has been tested somewhat and it is surviving. The Panel and the Circuit should have viewed the way the system functioned in theory under the Emergency Rule on March 20, 1985 (the date of the hearing). In this case, it was not in all respects constitutional *because of how it failed to function* and the "informal" steps that were taken to obtain a decision after Judge Seymour had announced his belief that Petitioner was *not* a fiduciary. (Transcript, Jan. 31, 1984, page 106, line 16).

The Court below clearly "altered, abridged and modified" Petitioner's substantive rights. That is the effect of there having been a decision on issues that were not litigated, and no new trial and/or review here as mandated by the Emergency Rule. Without trial and review, this was an ill-conceived, illegal, rubber-stamp procedure.

It was an oft-repeated error and the continuing effort to maintain Judge Seymour as a Bankruptcy Judge manifested a persistent disregard for the federal rules and the

tenets of Article III jurisdiction. Accordingly, the Circuit's failure to issue its Writ of Mandamus re-instating the appeal constituted an abuse of judicial discretion. *Wheeler v. United States, supra.*

C. The Transition Statutes and the Emergency Rule Did Not Empower the District Court to Appoint a Retired Referee as Bankruptcy Judge. A Review of What Occurred and an Analysis of the Law is not Merely an Intellectual Exercise Since it Helps Explain the Perceptions that Resulted in Judge Russell Being Asked to Act in Place of the Judge Who Heard the Evidence.

The Emergency Rule provided for a general reference to the Bankruptcy Judges of the Central District [(C)(c)(1) "Reference to Bankruptcy Judges"]. Those judges had been appointed to office for 14-year terms by the President, with the advice and consent of the Senate [28 U.S.C. Section 152, 153(a)], and were subject to removal by the "Judicial Council of the Circuit" on account of incompetence, misconduct, neglect of duty or physical or mental disability" (28 U.S.C. Section 154).

Incumbent Bankruptcy Referees serving six-year terms for compensation were designated to serve as Bankruptcy Judges until March 31, 1984, or until their successors took office [28 U.S.C. Section 404(b)]. The District Court by Order dated November 12, 1982, appointed Judge Seymour, a Retired Annuitant, to serve as a Bankruptcy Judge. (Appendix I.)

28 U.S.C. Section 452 entitled "Definitions", identifies those judges of the Courts of Appeals, District Court, Court of International Trade "any any Court created by act of Congress, the judges of which are entitled to hold office during good behavior." (28 U.S.C. Section 451)

Judge Seymour had earlier retired from office as a Referee, and, that status is *not* included.

In the 1978 Act, Congress intended original but not exclusive jurisdiction in the District Court in matters arising under Title 11 [28 U.S.C. Section 1471(b)]. That jurisdiction was to be exercised by the newly created Bankruptcy Court and the judges of that Court serving without tenure.

Since Article III bars Congress from establishing, under its Article I powers, legislative courts to exercise jurisdiction over all matters arising under the Bankruptcy Laws, the grant of jurisdiction could not be sustained as an exercise of Congress' power to create adjuncts to an Article III Court. the Bankruptcy Court therefore functioned solely (at the time of the trial below) by virtue of the Emergency Rule.

It must be concluded that the appointment by the District Court of a retired annuitant, a private citizen as it were, who did not have status as a Judge of any Court created by Act of Congress, was improper. The District Court was neither empowered under the so-called transition statutes [Section 404(d)] or any other power including the power hereinabove discussed in the Emergency Rule to thus deal with the exceptional circumstances found to exist by virtue of this Court's decision in *Marathon*.[9]

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[9] *Marathon* held Section 241(a) was non-severable and it struck the entire statute, leaving no remnant of power in either Court. Without some remnant of power, the District Court had no basis upon which to appoint the Retired Annuitant except as a Special Master under F.R.C.P. 53. Assuming, *arguendo*, that there is room to conclude Section 241(a) was severable, the mandatory reference called for in 28 U.S.C. Section 1471(c) is exclusive and prevents the exercise of power by the District Court under Sections 1471(a) and 1471(b).

Uncomfortable as thus concluding may be, the fact remains that there was no authority pursuant to which the District court could designate Judge Seymour to sit or permit Judge Russell to decide a case summarily without first satisfying himself that Petitioner Lawrence J. Galardi did not have "two heads" and without observing the conduct and demeanor of the Lerner Brothers and their lack of credibility.[10]

Responsible jurists sitting as trial judges resolve conflicting evidence as a matter of course. Research reveals absolutely no case in which punitive damages have been awarded without the Court first taking the measure of the defendant, without an appearance before the judge and without an independent assessment of the defendant. Petitioner submits our system affords or should afford that guarantee and without review upon certiorari, that fundamental right of due process is lost to Petitioner.

The bankruptcy system continued while Congress continued to consider remedial legislation. Judge Russell did not address that, however, presumably because it was perceived that Judge Seymour was without power. During the congressional exercise, disagreement over the status of Bankruptcy Judges increased. No one focused on "Retired Annuitants" however. The House Judiciary Committee reported its Conclusions (significantly, in early 1983) that an Article III Bankruptcy Court was

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There is no room to conclude, therefore, that the District Court had any authority to appoint a retired annuitant who had no standing as a judge of a United States Court. And, that was not cured by ignoring the absence of jurisdiction and simply contriving a circumstance that permitted Judge Russell to summarily rule on substantive issues.

[10]Both awarding punitive damages and entering a judgment in adversary proceeding 81-0656 RS are certainly without the ambit of a "core proceeding" and thus require an Article III court, in any case.

needed. [H.R. 3, 98 Congress, Rep. No. 9. Pt. 1, 1st Sess. (193)]. Later the Senate Judiciary Committee reported a bill establishing non-Article III Bankruptcy Judges to "assist the District Courts" which would "retain" bankruptcy authority (S. 1013, 98 Congress; see, S. Rep. No. 55, 98 Congress 1st Sess. (1983)]. That report concluded as this Court had concluded in *Marathon* that the jurisdictional grant of the District Court was to be exercised exclusively by the Bankruptcy Court, which was a "non-adjunct" Court, a "non-legislative" Court and a "non-Article III" Court. That is why Judge Seymour had no power and whoever made or participated in the decision to transfer this case to Judge Russell, recognized that.

Shortly prior to the termination of the transition period, the House agreed with the Senate position and Bankruptcy Judges were made "adjuncts" of the District Courts. (See, H.R. 5174, 98 Congress, 2nd Sess. with S. 1013, 989 Congress, 2nd Sess.)

Thereafter, an interim measure amending the 1978 Act extended the transition period for *appointed Judges* to April 30, 1984 [B.L. No. 98-249, 98 Stat. 116 (March 31, 1984)]. Another extension of the transition period to March 25, 1984 [P.L. No. 28-271, 98 Stat. 163 (April 30, 1984)] and a series of additional extensions of the transition period were then enacted prior to the agreement by both houses to the Conference Report in June of 1984.

The "Bankruptcy Amendments and Federal Judgeship Act of 1984" were the result. (P.L. No. 98-353, 98 Stat. 33, July 10, 1984). *This trial was concluded by Judge Seymour six months earlier, on January 31, 1984.*

The 1984 Act resolved the transition of "Bankruptcy Judges." It must be noted that the terms of the *judges then sitting by appointment* (28 U.S.C. Section 152), con-

tinued by operation of the holdover provisions in sections 404(b) and (d) of the Bankruptcy Act of 1978.

The *retired annuitant sitting below, however, was appointed by District Court Order outside the operation of the transition provisions and without benefit of being a retained Bankruptcy Judge in office after the expiration of the stated term or until a successor took office.*

The District Court therefore had no power to thus act and certainly the Bankruptcy Court could not, "in-house" and acting even on its own recognition of the problem, cure it by arranging the transfer of the case to Judge Russell.

The Retired Annuitant was not a "sitting judge" within the meaning of the transition statutes. His earlier right to hold over as a referee had long since expired. There was no authority to appoint judges conferred upon the District Court by the 1978 Act and that authority is not inherent in the District Court, in any case. There was no threat of disruption of the bankruptcy system, here. That is why *the transition statute and the holdover provisions were critical to who was permitted to sit* during the period June 28, 1982 through July 19, 1984.[11]

Finally, Judge Seymour's appointment was clearly in violation of the "Appointments Clause" (Article II, section 2, clause 2 of the Constitution). Being neither a then-

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[11]Had Judge Seymour been other than a retired annuitant, arguably, Article II, section 2, clause 2 of the Constitution might have colored the authority of the District Court to extend a sitting Bankruptcy Judge by virtue of the constitutional grant to the Congress of authority to vest appointment to inferior offices, as applicable, in the court of law. *Myers v. United States*, 272 U.S. 52, 128 (1926). But, Article II, section 2, clause 2 and 28 U.S.C. Section 152 cannot be circumvented by a District Court appointment.

sitting Bankruptcy Judge appointed under 28 U.S.C. section 152, or an incumbent Referee, there was no constitutional authority for his holding-over and there was no constitutional authority for his appointment. He was without power to try or decide the case.

Therefore, Petitioner respectfully submits this Court should grant certiorari.

SUMMARY OF ARGUMENT

CERTIORARI SHOULD BE GRANTED

The refusal of the bankruptcy panel to hear this appeal on the merits constituted a departure from the accepted and usual course of judicial proceedings. In these circumstances, that departure was extraordinary. The failure of the Ninth Circuit to issue its Writ of Mandamus reinstating the appeal constituted an abuse of discretion and a departure from the accepted and usual course of judicial proceedings sufficient to warrant an exercise of this Court's power of supervision.

The conflicting decisions in the bankruptcy court on pivotal issues, i.e. whether there was or was not a partnership, and the consequent prejudice to Petitioner and denial of due process, warrant review upon certiorari.

The award of punitive damages without opportunity for hearing and without personally observing Petitioner and otherwise determining the credibility of witnesses with respect to critical conflicting testimony, constitutes a violation of due process.

The award of $93,652.83 in attorneys' fees without first taking evidence as to whether the fees were reasonably necessary and reasonably incurred and without making appropriate findings, is both a violation of due process, in

conflict with decisions in other Circuits and of this Court, and an abuse of judicial discretion. The failure of the Panel to review and of the Ninth Circuit to reinstate the appeal so as to permit review on the merits, constitutes a departure from accepted judicial proceeding sufficient to warrant exercise of this Court's power of supervision.

The trial court was without subject matter jurisdiction. The district court had exceeded its authority in appointing a retired annuitant as a bankruptcy judge. There was no authority for that appointment in either the transition statutes, the holdover provisions, the Federal Rules of Civil Procedure or, by virtue of any provision of the Constitution of the United States.

The findings of fact entered by Judge Russell, who did not try the case, were clearly erroneous in material particulars. The conclusions of law and judgment entered by Judge Russell were in error, as a matter of law. The Panel had adequate and persuasive reasons before it, as did the Ninth Circuit, to mandate review.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits this Petition for Writ of Certiorari should be granted.

DATED: September 21, 1987

Respectfully submitted,

LAWRENCE J. GALARDI
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On September 22, 1987, I served the within Petition for Writ of Certiorari in re: "Lawrence J. Galardi v. Bernie Lerner" in the United States Supreme Court, October Term 1987. Appendix filed under separate cover, No. ...

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on September 22, 1987, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA